

# **Supreme Court of the United States.**

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**No. 192.**

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**NEW ORLEANS TAXPAYERS,**

**versus**

**SEWERAGE AND WATER BOARD OF NEW ORLEANS.**

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**OCTOBER TERM 1914.**

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**SUPPLEMENTAL BRIEF ON BEHALF OF THE TAX-PAYERS, PLAINTIFFS IN ERROR.**

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During the course of the argument, in this Court, it developed that your Honors were not entirely satisfied with the mere statement of Plaintiff's Counsel that they based their petition for relief on the fact that they stood on a contract right protected by the Constitution of the United States which could not be impaired by the State Legislature.

We stated that the question was a very important one to the taxpayers and we need not give, any reason outside of the Record.

The New Orleans taxpayers, in fact, as your Honors will perceive by the record, petitioned the Council of the

City of New Orleans to obtain for them, chartered rights, which would be embodied in the Constitution of the State as a part thereof.

Their petition with all the conditions attached, was granted; a charter was given them, the Sewerage and Water Board were created, the taxes were paid and extensive water and sewerage works were established.

The present Sewerage and Water Board is the successor of the New Orleans Water Works, with enlarged powers.

The Charter of the New Orleans Water Works Co. was granted by the Legislature of the State of Louisiana in 1877, Act No. 33 of the extra session p. 51, which we have copied in full in the appendix.

By this Charter the New Orleans Water Works Co. was given the exclusive privilege; of furnishing water to the inhabitants of the City.

The Constitution of 1879, sought to take away this exclusive privilege; the water works complained of the violation of their chartered rights. The lower Court maintained a demurrer to their bill setting up this contention.

When the case came up, before this Court, your Honor reversing the judgment of the lower Court said:

"And as the object to be attained was a public one, for which the State could make provision by legislative enactment, the grant of the franchise could be accompanied with such exclusive privileges to the grantee, in respect of the subject of the grant, as in the judgment of the Legislative department would best promote the public health and the public comfort, or the protection of public and private property. Such was the nature of the plaintiff's grant, which,

not being at the time prohibited, by the Constitution of the State was a contract, the obligations of which cannot be impaired by subsequent legislation, or by a change in her organic law. It is as much a contract, within the meaning of the Constitution of the United States, as a grant to a private corporation of public services to be rendered by it, of the exclusive right to construct and maintain a railroad within certain lines and between given points, or a bridge over a navigable stream within a prescribed distance above and below a designated point." 115 U. S. 680.—*New Orleans Water Works Co. vs. Rivers.*

Quoting *N. O. Gas Light vs La. Light Co.* 115 U. S. 650.

See also 120 U. S. 64—*St. Tammany Water Works vs. N. O. Waterworks Co.*

Approved in 164 U. S. 474 *N. O. Waterworks vs. New Orleans.*

This same principle was established since the Dartmouth case, 4 Wheaton 643, in a long line of decisions which have been uniformly followed by this Honorable Court.

The act of 1877 No. 33 p. 51 of the extra session which your Honors maintained as a contract, is entitled:

"An act to enable the City of New Orleans to promote the public health and to afford greater security against fire, by the establishment of a corporation to be called the New Orleans Water Works Co."

Now Act No. 6 of 1899, printed in full in Plaintiff's original brief at p. 30, is entitled:

"An act to make effective the vote and levy of the Special tax, \*\* by constituting and establishing a Sewerage and Water Board for the City of New Orleans and defining its powers, duties rights and obligations with reference to the public, the City Council the Board of Liquidation.

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If this Court defines the former act as creating a contract under the Constitution of the United States, the latter act must be included in the same category.

In one case the private capital of the incorporators was used to carry out the objects of the act, in this case the voluntary payment and contribution of the taxpayers is the capital employed to perform the work.

Bonds were issued under both acts, and both were created for the same purpose excepting that the scope of the latter was greater than that of the former.

The Charter of the New Orleans Waterworks Co. was declared forfeited by the Supreme Court of Louisiana, because the Company violated the conditions imposed by its charter: it did not furnish clear water, as directed and it overcharged its customers, some to a greater extent and others to a less amount. A writ of error was taken to this Court and dismissed for want of jurisdiction.

107 *La. 3 State vs. New Orleans Water Works Co.*

185 *U. S. 336. New Orleans Waterworks Co. vs. State.*

The property erected, and constructed by the taxpayers, and their board, under the authority of this act was in no sense public property which the Legislature could take away from them, dispose of as they might wish.

It belongs to that species which is termed private property, which the Legislature cannot take away from its owners.

"Notwithstanding the power of the Legislature over the City of New Orleans, its property is protected like that of any other person. Story on the Constitution Sections 1393-1399. 2 Peters 380-412-627-657. 6 *Cranch* 67-134—4 *Hill* 144—3 *Dallas* 386—8 *Wend.* 85—18 *Wend.* 56-61-63—*Cooley on Limitations* 487—21 *Penn.* 147; 7 *Wall* 289."

27 A. 521—*N. O. Mobile & R. R. vs. City of New Orleans.*

By the 35 Section of the act chartering the Sewerage and Water Board the act reserves to the General Assembly the right and power to amend the act in any respect,

*"Not violative of the conditions upon which the said special tax was voted by the property tax payers of the City of New Orleans and not impairing the vested rights or the contract rights of the holders of the bonds issued under its provisions."*

Page 50—Plaintiff's original brief.

We are asking the Court to enforce one of the conditions of the petition of the property tax payers, which cannot be amended by the legislature.

Plaintiffs in error therefore pray that the judgment of the Supreme Court of Louisiana be reversed and that the act of the Legislature of 1908 No. 270 be annulled and set aside as prayed for.

Respy. submitted,  
CHS. LOUQUE,  
of Counsel.

Mch. 13th, 1915.

**APPENDIX.****AN ACT OF 1877—EXTRA SESSION, PAGE 51.**

No. 33.]

To enable the City of New Orleans to promote the public health and to afford greater security against fire, by the establishment of a corporation to be called the "New Orleans Waterworks Company;" to authorize the said company to issue bonds for the purpose of extending and improving the said works, and to furnish the inhabitants of New Orleans an adequate supply of pure and wholesome water; to permit the holders of Waterworks bonds to convert them into stock, and to provide for the liquidation of the bonded and floating debt of the City of New Orleans.

**Section 1.** *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened,* That a corporation be, and the same is hereby created, to be styled "The New Orleans Waterworks Company," the capital stock whereof shall consist of two millions of dollars, which shall be divided into twenty thousand shares of one hundred dollars each.

**Sec. 2.** *Be it further enacted, etc.,* That immediately after the organization of the said Waterworks Company, as hereinafter provided, it shall be required to issue to the City of New Orleans, stock to the amount of six hundred and six thousand six hundred dollars, as full paid, and not subject to assessment; and in addition thereto, one similar share for every one hundred dollars of Waterworks bonds which said city may have taken up heretofore and extinguished by payment, exchange or otherwise; and that the residue of said capital stock shall be reserved for the benefit of all holders of Waterworks bonds, to the extent of the amount now outstanding, who may elect to avail themselves of the provisions of this Act; and the said Waterworks Company shall issue to the said City of New Orleans, to be exchanged with the holders of said bonds, one share of full paid stock not subject to assessment, for each and every one hundred

dollars of said Waterworks bonds; and the said bonds, as fast as surrendered and exchanged for stock as aforesaid, be cancelled; that for the purpose of effecting said exchange of outstanding Waterworks bonds for stock, as aforesaid, the City of New Orleans shall be entitled to all the certificates for the shares of said stock of said New Orleans Waterworks Company and shall, by advertisement for six months in two newspapers in the City of New Orleans and two newspapers in the City of New York, give notice that it will exchange said stock at par for said Waterworks bonds at par, exclusive of the overdue coupons attached to said bonds, which shall constitute a separate demand against said city; and in case any of the said bondholders shall fail or refuse to avail themselves of this Act within one year from the formation of said company, the said City of New Orleans shall not thereafter be required to make said exchange, but may retain the unused shares of stock for its own account and benefit, unless it shall prefer to continue to take up any of said outstanding bonds by exchange as aforesaid.

**Sec. 3.** *Be it further enacted, etc.,* That the said Waterworks Company shall be organized by the Mayor of the City giving thirty days' notice that he will receive subscriptions of bondholders who may agree to exchange their bonds for stock as aforesaid; and the said city shall at once subscribe for stock to the amount of six hundred and six thousand six hundred dollars, and such further amount as shall equal the par value of any of said Waterworks bonds, which shall have been extinguished by said city; and as soon as in addition to the subscription of said city there shall be subscribers for an exchange of said bonds for stock to the extent of five hundred thousand dollars, and the said amount of bonds shall have been actually surrendered to and cancelled by the Administrator of Finance, the said subscribers shall assemble together, on a day to be named by the Mayor, and shall elect a board of directors, to consist of seven persons, four of whom shall be designated by the Mayor, and the remaining three shall be elected by said subscribers, other than said city, from amongst themselves; and the persons thus designated and elected shall constitute the first board of directors, and shall continue in office until

the first of July, eighteen hundred and seventy-eight, and the said board shall elect one of their number as president.

**Sec. 4.** *Be it further enacted, etc.*, That as soon after the election of said board of directors as the City Council may determine, the Mayor of the City shall transfer, by notarial act, to said New Orleans Waterworks Company the waterworks and all the property appurtenant thereto.

**Sec. 5.** *Be it further enacted, etc.*, That the said Waterworks Company shall own and possess the privileges acquired by the City of New Orleans from the Commercial Bank; that it shall have for fifty years from the passage of this Act the exclusive privilege of supplying the City of New Orleans and its inhabitants with water from the Mississippi river, or any other stream or river, by means of pipes and conduits, and for erecting and constructing any necessary works, or engines, or machines for that purpose; that it may contract for, purchase or lease any land or lots of ground, or the right to pass over and enter the same from time to time as occasion may require, through which it may be necessary to convey the water into said city, or to distribute the same to the inhabitants of said city; and to construct, dig, or cause to be opened, any canals or trenches whatsoever, for the conducting of the water of the rivers from any place or places it may deem fit, and to raise and construct such dykes, mounds, reservoirs, as may be required for securing and carrying a full supply of pure water to said city and its inhabitants; to enter upon and survey such lands as it may think proper, in order to ascertain the best mode of furnishing a supply of water; to lay and place any number of conduits, or pipes, or aqueducts, and to cleanse and repair the same, through or over any of the lands or streets of the City of New Orleans; *provided*, the same shall not be an obstruction to commerce or free circulation; and also to have and use a common seal and alter the same at pleasure; to ordain and establish by-laws for its government and that of its officers and employees, not repugnant to this Act and the constitution of the State and of the United States, or the ordinances of the City of New Orleans.

*Sec. 6. Be it further enacted, etc.,* That on the first Monday of July, eighteen hundred and seventy-eight, and annually thereafter, an election for directors of said company, after ten days' notice of the time and place of holding the same, shall be held, at which election there shall be elected four directors by all the stockholders other than the City of New Orleans; and the Mayor of the city, the Administrator of Waterworks and Public Buildings and the Administrator of Finance of said City, shall be *ex officio* directors of said company; the said city, through its Mayor and Administrators, shall have the right to vote at the election of directors, and at all meetings of said stockholders, in the same manner as any other stockholders. That at all elections and all meetings of stockholders each share of stock shall be entitled to one vote. The directors elected shall serve for one year and shall hold their offices until their successors are appointed; and no failure to elect directors at the time designated shall prevent the board of directors from fixing another day for holding the election; and in case of vacancy in the board of directors occasioned by death, resignation or absence from the State or other cause, the board of directors may fill such vacancy for the remainder of the year.

*Sec. 7. Be it further enacted, etc.,* That the stock owned by said City of New Orleans in said Waterworks Company shall not be liable to seizure for the debts of said city.

*Sec. 8. Be it further enacted, etc.,* That the stock of said Waterworks Company may be increased to two millions of dollars, for the purpose of enabling said company to improve, enlarge and extend its works; *provided*, that the new or increased stock shall be paid for in cash, or in work done for the company; and in case of non-payment of instalments on stock subscribed for, the same may be forfeited to the use of said company.

*Sec. 9. Be it further enacted, etc.,* That the board of directors of said company shall have power, in addition to the authority to increase its capital stock, to borrow money for the purpose of improving and enlarging its works, and increasing the supply of pure water; and to accomplish this purpose the said board of directors are

hereby authorized to issue the bonds of the company to an amount not exceeding two millions of dollars, in such sums, on such terms and bearing such rate of interest, as said board may determine, and the payment of said bonds, in principal and interest, may be secured by a mortgage of all the property and franchises of said company, including its franchise to be a corporation, and said mortgage may include the property and franchises of said company, acquired or to be acquired, and the registration of said mortgage in the office of the Recorder of Mortgages for the Parish of Orleans shall operate on the property and franchises of said company, wheresoever situated, and shall be and continue a valid and subsisting mortgage until the payment of the debt secured by it, without re-inscription; *provided, however,* that no bond shall be issued, or mortgages given, without the consent of the Council of the City of New Orleans, and said bond shall not be sold or disposed of except on such terms as shall be approved by said Council of said city.

**Sec. 10.** *Be it further enacted, etc.,* That said company shall not declare or pay any dividends except in cash, and then only out of the net semi-annual or annual receipts, after payment of expenses of operation, and the interest on its bonded debt, nor shall any dividends be declared until the contemplated works are completed and in use.

**Sec. 11.** *Be it further enacted, etc.,* That the City of New Orleans shall be allowed to use water from the pipes and plugs of said company now laid, or hereafter to be laid, free of any charge, for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets and charitable institutions, and that the said company shall place, free of any charge, whatever, two hydrants of the most approved construction in front of each square, where a main pipe shall be laid at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn for the extinguishment of fires, for watering the streets and cleansing the gutters, and for any other public purpose; that on the squares which do not front on the river the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other and the corners. It shall be

the duty of the said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter; and in consideration thereof the franchises and property of said New Orleans Waterworks Company, used in accordance with this Act, shall be exempt from taxation—State, municipal and parochial.

*Sec. 12. Be it further enacted, etc.,* That the said Waterworks Company shall have the right in the City of New Orleans and its suburbs and adjoining lands, to use the streets and public places for the purpose of laying pipes and hydrants to run water; *provided*, that said streets shall not be obstructed longer than necessary for such purpose, or for making repairs, and that said streets shall be restored to the same condition they were in as soon as practicable, by the said company, under the supervision of the City Surveyor. In case the said Waterworks Company shall require any lot of ground in the city of New Orleans, or any lot of ground or quantity of land situated in any parish of this State for the purpose of constructing reservoirs or other works, or for the purpose of laying pipes to conduct water to the City of New Orleans, and shall not be able to agree with the proprietor or proprietors of said lot of ground or land, the said company shall have power to cause the same to be expropriated in pursuance of the general laws on the subject of expropriation for works of public utility now in force, or which may hereafter be enacted, and if the object of said company be merely to lay pipes through a piece of land or lot of ground, the expropriation shall be confined merely to the servitude it may require, and not to the right of absolute ownership.

*Sec. 13. Be it further enacted, etc.,* That the said Waterworks Company, immediately after its organization, shall proceed to the erection of new works and pipes sufficient in capacity to furnish a full and adequate supply of water, to be drawn from the Mississippi River, or elsewhere, as may be judged most expedient; that said new works and pipes shall be commenced within twelve months from the passage of this Act, and shall be year by year completed, so that, within five years from the date of this Act, they shall be completed so as to give an adequate

supply of water to the people of the City of New Orleans, exclusive of the Fifth District. If said work be not done as above prescribed, said corporation shall forfeit all exclusive privileges granted herein, and the city shall have a right to contract with any one else for a supply of water as above provided, and to expropriate the property of the corporation hereby created. After the completion of the new works and pipes, the said company shall, from time to time, as the wants of the population may require, and when the estimated revenue on the cost of such extension shall equal ten per centum, extend their works throughout the entire limits of the city and suburbs, and any future extension of said city; and any failure by said Waterworks Company to comply with this provision shall work a forfeiture of this charter.

**Sec. 14.** *Be it further enacted, etc.,* That the City of New Orleans, through its Council, shall have authority to apply the stock subscribed for by said city, as herein provided, to the reduction of the bonded or floating debt of the said city, on such terms of adjustment as may be mutually agreed upon between the City Council and the holders of such bonded or floating debt; *provided*, said stock shall not be sold at less than par, and that when sold for obligations of the city, it shall only be under sealed proposals, after not less than fifteen days' advertisement in two daily papers, to the bidder who shall offer said obligations at the most advantageous rate, the Council reserving the right to reject any and all bids.

**Sec. 15.** *Be it further enacted, etc.,* That the said Waterworks Company shall have the right to fix the rates of charges for water; *provided*, that the net profits of the company shall not exceed ten per cent. per annum, and shall publish sworn annual statements of its business and condition; and that the City Council shall have the power to appoint a committee, of not less than five, who shall have access to the books of the said company, and make such extracts from the same as they may deem necessary, and in case the said profit shall exceed ten per cent., the City Council shall have the right to require said company to reduce the price of water in such manner, and in such a proportion, that the profits shall never exceed the above named rates; *and provided further*, that

the rates charged shall never exceed those now paid by the city, and in case said company shall refuse compliance, the demand of said city may be enforced by a writ of mandamus.

*Sec. 16. Be it further enacted, etc.,* That if any person or persons shall obstruct the said company, their successors, agents, workmen or servants, in conveying the said water into the said city and its suburbs, or shall change, alter, remove, injure or destroy any work or part of a work made by the said company, or cause to be made, for the purpose of introducing water into the City of New Orleans, under the authority of this Act; or if any person shall alter, change or pollute the water or stream which the said company shall hereafter introduce, or be preparing to introduce, such person or persons shall be indicted in the proper court for the trial of such offense, and being thereof convicted, shall be fined at the discretion of the Court, according to the nature of the offense, and imprisonment for a term not exceeding seven years, such fine to be paid and applied to the use of said company.

*Sec. 17. Be it further enacted, etc.,* That until other works are constructed by which the present works may be dispensed with the same shall remain under the control of the City Council, and the superintendence thereof remain in the hands of the Administrator of Waterworks and Public Buildings; but the said company shall be authorized to collect the revenues thereof and apply them to the expense of operating and extending the works. At the expiration of fifty years from the organization of the company, the city shall have a right to buy the works, conduits, pipes, etc., of the company, at a valuation to be fixed by five experts; two to be named by the city, two by the company, and the four to select the fifth expert; but should the city neglect or refuse to purchase said works, etc., as above provided, the charter of the company shall be *ipso facto* extended for fifty years longer, but without any exclusive privilege or right to supply water, according to the provisions of the charter.

*Sec. 18. Be it further enacted, etc.,* That nothing in this Act shall be so construed as to prevent the City Council from granting to any person or persons, contiguous to

the river, the privilege of laying pipes to the river, exclusively for his own or their own use.

(Signed) LOUIS BUSH,  
Speaker of the House of Representatives.

(Signed) LOUIS A. WILTZ,  
Lieutenant Governor and President of the Senate.  
Approved March 31, 1877.

(Signed) FRANCIS T. NICHOLLS,  
Governor of the State of Louisiana.

A true copy:

WILL A. STRONG,  
Secretary of the State.

